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No. 81-2135

IN THE
Supreme Court of the United States
OCTOBER TERM, 1981

UNIROYAL, INC.,
Petitioner,

v.

ALTA CHRAPLIWY, *et al.*,
Respondents.

RESPONDENTS' SUPPLEMENTAL BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

THOMAS R. EWALD *
THOMAS R. EWALD, P.C.
1730 Rhode Island Avenue, N.W.
Washington, D.C. 20036
(202) 466-6464

DAVID R. BOYD
ROGOVIN, HUGE & LENZNER
A Professional Corporation
1730 Rhode Island Avenue, N.W.
Washington, D.C. 20036
(202) 466-6464

* Counsel of Record

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Petitioner Uniroyal's Supplemental Brief urges the Court to grant certiorari to review *Chrapliwy* v. *Uniroyal, Inc.*, 670 F.2d 760 (7th Cir. 1982), *petition for cert. filed*, No. 81-2135, and establish a rigid rule requiring that the normal billing rates of prevailing Title VII plaintiffs' counsel—even if found to be reasonable—should be disregarded and limited in every instance to the hourly rates charged by members of the local bar in the community in which the action was filed. In support of this position Uniroyal seeks to create a conflict between the Seventh Circuit's decision in this case and the decision of the United States Court of Appeals for the District of Columbia in *Donnell* v. *United States*, No. 81-1471 (D.C. Cir. June 25, 1982),[1] by misrepresenting the holdings of both.

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[1] The decision in Donnell v. United States, No. 81-1471 (D.C. Cir., June 25, 1982), will be cited as it appears in Appendix E to

There is no conflict between these two decisions, as the D. C. Circuit explicitly recognized in *Donnell*. (E-19-20) Indeed, an examination of the *Donnell* decision clearly indicates that the D. C. Circuit would have decided *Chrapliwy* in the same manner as did the Seventh Circuit, and confirms that *Chrapliwy* does not establish the rigid or pervasive standard that Uniroyal claims.

In the present case both plaintiffs and defendants were represented primarily by attorneys from outside South Bend, Indiana, where the case was filed.[2] Prevailing plaintiffs' attorneys proved their normal hourly rates for litigation at South Bend and elsewhere. Their rates were undisputed by the defendant, and the district court found them to be both reasonable and consistent with the hourly rates that Uniroyal had paid its own attorneys in its unsuccessful defense. (App. A-6; A-13) Despite those findings, however, the trial court held that Title VII required it to "balance" plaintiffs' attorneys' rates against South Bend rates and, without further explanation, cut plaintiffs' rates to below South Bend levels. (A-14) The Seventh Circuit correctly reversed.

Uniroyal now falsely charges that the Seventh Circuit "held that when any doubt exists concerning which legal community should be considered in setting 'the fee customarily charged in the locality for similar legal services' preference should be given to the locality where counsel normally practices." Uniroyal's Supplemental Brief at 3. Nothing in the *Chrapliwy* opinion supports that characterization. To the contrary, the Seventh Circuit held that

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petitioner Uniroyal's Supplemental Brief in Support Of Petition For Writ of Certiorari. The *Chrapliwy* decision presented for review and the district court's opinion in that case will be cited as they appear in Appendix A and B of Uniroyal's original Petition.

[2] Plaintiffs' primary counsel were from Washington, D. C. and New York, and defendants were primarily represented by counsel from Washington, New York and Chicago. Both parties have been represented in the court of appeals and before this Court by counsel from outside South Bend.

the district court should examine a number of factors, including the fees charged by members of the local bar, in determining the "reasonable" rate to be awarded the prevailing Title VII plaintiffs. It additionally found that the record in this case supported the district court's determination that the normal hourly rates of the prevailing plaintiffs' attorneys were reasonable, and that the district court erred in restricting the award to lower rates in this case. As the court stated,

> . . . "The fee customarily charged in the locality" remains one of a number of factors to be considered as guides, and nothing in *Waters* or the Disciplinary Rule makes that factor an overriding limitation.
>
> Although the district court seems to have disclaimed limiting counsel to South Bend rates, it appears that that in fact happened, without any suggestion that the choice of counsel was improvident or counsel's billing rates were out of line with those charged by available counsel of similar expertise, otherwise similarly situated. We conclude there was error. (A-17)

Contrary to Uniroyal's contention, the *Chrapliwy* decision is not "squarely in conflict" with the D. C. Circuit's decision in *Donnell*, Uniroyal's Supplemental Brief at 4, and nothing indicates that the D. C. Circuit would have decided *Chrapliwy* differently.[3] The rule announced in *Donnell* "that the relevant community is the one in which the district court sits," (E-19) is not to be applied rigidly, as Uniroyal urges. Indeed, *Donnell* referred to

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[3] In *Donnell*, three of the four attorneys whose fees were at issue were salaried employees of the Lawyers' Committee for Civil Rights Under Law and presumably had no normal hourly billing rate that they charged their clients. In *Chrapliwy*, by contrast, counsel for plaintiffs and defendants alike were private counsel, and the normal hourly rates of the prevailing Title VII plaintiffs' attorneys were comparable to rates charged by defendant's counsel in this very litigation. This factor, which was not considered in *Donnell*, was of central importance in *Chrapliwy*.

other situations in which the general rule it announced should not be followed, and expressly concluded that its decision does not conflict with the Seventh Circuit's decision in *Chrapliwy*. (E-19-20) Nor did the *Donnell* court suggest that the normal billing rates of prevailing parties' out of town counsel are to be ignored, especially where, as here, their opponent is represented by out-of-town counsel charging comparable, or higher, rates. Indeed, the emphasis in *Donnell* was on "the prevailing market rate within the jurisdiction." (E-19) Applying that principle in *Chrapliwy* would not alter the result, for in *Chrapliwy* the prevailing market rate for the very litigation at issue was the rate charged by petitioner Uniroyal's own counsel. The district court not only found the rates of plaintiffs' attorneys to be reasonable, it found them comparable to the rates charged by defense counsel in the same case. (B-27; A-6; A-13-15).[4]

Uniroyal challenges the *Donnell court's* distinction of *Chrapliwy*, maintaining that the trial court in *Chrapliwy* made no finding that competent lead counsel were not available in the district where the action was filed. Uniroyal's Supplemental Brief at 3, n.3. However, it is quite clear that both lower courts in this case recognized the importance of plaintiffs' retention of specialized counsel, as evidenced in part by the fact that Uniroyal itself retained major out-of-town counsel to conduct its defense. (B-28-30; A-15-17). Plaintiffs' choice of counsel, which both lower courts found to be reasonable, should be honored. Indeed, a rule requiring courts to award less than prevailing plaintiffs' attorneys' reasonable normal hourly billing rates would defeat the statutory purposes

[4] The Eighth Circuit's decision in *Jorstad* v. *IDS Realty Trust*, 643 F.2d 1305 (8th Cir. 1981), on which Uniroyal also relies, is likewise consistent with the Seventh Circuit's decision in this case and contrary to the company's position. In *Jorstad* the district court awarded prevailing plaintiffs' attorneys' fees based on a lodestar figure that doubled their normal hourly billing rates. The court of appeals reversed, reducing the award to plaintiffs' attorneys' normal hourly rates. 643 F.2d at 1313.

of the Act, especially in cases where, as here, defendant has hired high-priced out-of-town attorneys. Such a rule would discourage plaintiffs injured by unlawful discrimination from filing suit and would prevent them from obtaining attorneys of the same caliber as those available to defendants. *Cf. Newman* v. *Piggie Park Enterprises, Inc.*, 390 U.S. 400 (1968); *Johnson* v. *Georgia Highway Express, Inc.* 488 F.2d 714, 719 (5th Cir. 1974). Such a rule also would encourage employers to refuse to conciliate their violations and to delay proceedings, as Uniroyal has in this ten-year-long litigation, in an attempt to defeat by attrition plaintiffs' meritorious claims for relief.

Certiorari should therefore be denied.

Respectfully submitted,

THOMAS R. EWALD *
THOMAS R. EWALD, P.C.
1730 Rhode Island Avenue, N.W.
Washington, D.C. 20036
(202) 466-6464

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ROGOVIN, HUGE & LENZNER
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